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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: David C. May Confirmation No. 9351
Serial No.: 09/166,625 Art Unit: 1771
Filed: October 5, 1998 Examiner: Cheryl Ann Juska
For: HIGHLY DRAPABLE PROTECTIVE COVER HAVING ULTRATHIN
NON-WOVEN ABSORBENT LAYER

RESPONSE TO NOTICE OF NON-COMPLIANT APPEAL BRIEF

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Applicant submits a revised Appeal Brief in response to the notice mailed June 21, 2005. The present revised appeal brief is in compliance with 37 CFR 41.37(c)(1).

A statement of the status of all claims is included. A concise explanation of the independent claims (Nos. 1 and 10) is provided. A heading is provided for each ground of rejection. Regarding item 8 in the Notice, there is no evidence submitted under 37 CFR 1.130, 1.313 or 1.132 being relied on in the brief. Accordingly, there is nothing to provide in this regard. The examiner is invited to telephone the undersigned if there is some evidence that the examiner believes is relevant to this ground of objection as the undersigned has reviewed the file and finds no such evidence.

It is respectfully requested that, if necessary to effect a timely response, this paper be considered as a Petition for an Extension of Time sufficient to effect a timely response and shortages in other fees, be charged, or any overpayment in fees be credited, to the Account of Barnes & Thornburg, Deposit Account No. 10-0435 (32251-70829).

Respectfully submitted,

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PATENT

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APPEAL BRIEF (Revised)

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Below is an Appeal Brief in support of an appeal taken from the Rejection of Claims 1, 3-10 and 12-17 mailed August 25, 2004. A Request to Reinstate the Appeal accompanies the present brief.

1. **Real party in interest.** All rights in this application have been assigned to D.C. May Corporation, a corporation whose address is 215 Morris Street, Durham, North Carolina 27702.
2. **Related appeals and interferences.** Appellant, undersigned counsel for appellant, and assignee know of no appeals or interferences related to the present application on appeal.
3. **Status of Claims.** The application contains rejected claims 1, 3-10 and 12-17 (which is appealed as per the following arguments). Claims 2 and 11 are canceled. There are no allowed, confirmed, withdrawn or objected to claims.
Claims 1, 3-8, 10 and 12-16 have been rejected under 35 U.S.C. 103(a) as being unpatentable over Garland (U.S. Patent No. 5,266,390) taken in view of Reaves (U.S. Patent No. 5,368,912) and Tosper et al (U.S. Patent No. 5,761,853).

Claims 9 and 17 are rejected as being unpatentable over Garland taken in view of Reaves and Tosper et al and further in view of Wilson (U.S. Patent No. 5,443,885) and Mobley (U.S. Patent No. 5,227,409).

4. **Status of Amendments.** All amendments filed by appellant have been entered and considered by the examiner. On August 25, 2004, a rejection of all pending claims was issued. Appellant has not filed an amendment subsequent to the August 25, 2004 office action. Appellant's Notice of Appeal accompanies this brief.

5. **Summary of Claimed Subject Matter.**

Claim 1 is directed to a drop cloth for covering a surface, comprising: a first layer having a non-woven fabric material, said non-woven fabric material including natural fibers; and a second layer attached to said first layer, said second layer having a liquid impervious plastic material; wherein said first layer has a thickness; wherein said thickness is in the range of 1 to 2 mils. A drop cloth 10 is referred to in the specification at, for example, beginning on line 18 of page 5 and continuing to page 12 and is shown in the drawing in each of Figs. 1-4. Figs. 2 and 3 show drop cloth layers 14 and 16 (also discussed at pages 5-12 of the specification). The phrase "non-woven fabric" is defined in the specification at, for example, beginning on page 7, last four lines, wherein there is described any assembly of synthetic or natural fibers randomly interlocked and/or held together to form a mat or a web.

Claim 10 is directed to a drop cloth for covering a surface, comprising: a first layer having a non-woven fabric material, said non-woven fabric material including rayon fibers; and a second layer attached to said first layer, said second layer having a liquid impervious plastic material; wherein said first layer has a thickness; wherein said thickness is in the range of 1 to 2 mils. A drop cloth 10 is referred to in the specification at, for example, beginning on line 18 of page 5 and continuing to page 12 and is shown in the drawing in each of Figs. 1-4. Figs. 2 and 3 show drop cloth layers 14 and 16 (also discussed at pages 5-12 of the specification). The phrase "non-woven fabric" is defined in the specification at, for example, beginning on page 7, last four lines, wherein there is described any assembly of synthetic or natural fibers randomly interlocked and/or held together to form a mat or a web. Rayon is a well known material and is described at, for example, page 8, line 23.

6. Grounds of Rejection to be Reviewed on Appeal.

Whether claims 1, 3-10 and 12-17 are unpatentable under 35 U.S.C. 103(a) over Garland (U.S. Patent No. 5,266,390) taken in view of Reaves (U.S. Patent No. 5,368,912) and Tosper et al (U.S. Patent No. 5,761,853).

Whether claims 9 and 17 are unpatentable over Garland taken in view of Reaves and Tosper et al and further in view of Wilson (U.S. Patent No. 5,443,885) and Mobley (U.S. Patent No. 5,227,409).

7. Grouping of Claims. Claims 1, 3-8, 10 and 12-16 stand or fall separately. Claim 9 is grouped with claim 1. Claim 17 is grouped with claim 10.

8. Copy of the Claims. A copy of the Claims on appeal is attached to this Brief as Appendix A.

9. Argument.

The Prior Art

Garland discloses a three-layered drop cloth, each outer layer being of spun bonded polypropylene film intimately bonded, utilizing suitable bonding process such as point bonding, heat bonding technology or pattern spray adhesive laminating, to an intermediate or inner film selected from polyethylene or polypropylene. (See column 2, lines 3-8). At column 1, lines 13-30 Garland briefly discusses prior art canvas and cloth drop cloths and their disadvantages. This is not a teaching or suggestion of a 1-2 mil layer of non-woven fabric including natural fibers or rayon attached to a liquid impervious plastic layer.

Reaves discloses a protective cover

made from a variety of natural or synthetic materials, including a variety of woven fabrics such as cotton sheeting or a variety of plastic sheeting. However according to a preferred embodiment, the protective cover 10 of the invention is made from an air permeable, nonwoven polypropylene sheet weighing 1.50 ounces per square yard and manufactured by Kimberly-Clark Corp. which has the advantage of being lightweight, inexpensive and resistant to condensation. (Column 2, lines 56-65).

Reaves discloses woven natural fibers and nonwoven polypropylene and does not teach or suggest a 1-2 mil layer of non-woven fabric including natural fibers or rayon attached to a liquid impervious plastic layer.

Trosper et al discloses a dropcloth including a fabric layer. As stated in col. 2, lines 36-44

[t]he term "fabric" should be understood to mean any type of cloth, plastic, fabric or like material which can be easily spread over the floor or a workpiece. Preferred materials for this purpose include plastic sheeting, canvas, woven tarpaulin material and the like. A commercially available material that is preferred is known as POLYDUCK (available from Reeves & Co., Durham, N.C.), which is a cotton or similar fabric with a liquid impermeable back coating.

The Rejection of Claims 1 and 10 as unpatentable under 35 U.S.C. 103(a) over Garland (U.S. Patent No. 5,266,390) taken in view of Reaves (U.S. Patent No. 5,368,912) and Tosper et al (U.S. Patent No. 5,761,853).

The office action at page 4, last paragraph, states "it can be seen that the Garland patent teaches the limitation of said claims with the exception of (a) the claimed thickness and (b) that the nonwoven layer contains natural or rayon fibers." The office action goes on to point out that Garland's teaching of the nonwoven layers each in the range of 0.005 to 0.002 mils is in error. At page 5, lines 1-3 it is stated "it would not be possible to produce a fiber small enough to make spunbond polypropylene nonwoven having said thickness." In support of this statement it is alleged that a fiber having a denier of about 9×10^{-6} - 7×10^{-7} would be required. Then it is stated that "[t]he examiner knows of no technology that could produce a viable fiber of this size."

The above statements on page 5 of the office action speculate that Garland's range of 0.005 to 0.002 mils is in error, but do not offer persuasive evidence to substantiate the alleged error. It is not clear how the alleged fiber size of a denier of about 9×10^{-6} - 7×10^{-7} is arrived at. The examiner's unawareness of "technology that could produce a viable fiber of this size" is not conclusive that such technology does not exist. The office action does not establish that Garland's range of 0.005 to 0.002 mils is in error.

At page 5, lines 5-14 it is urged that Garland teaches (at col. 3, lines 66 - col. 4, line 3) the spunbond polypropylene nonwoven has a basis weight of 1-2 oz/yd². Then it is stated that "[f]or polypropylene fibers having an average density of 0.9 g/cm³, this would produce a nonwoven of about 38-76 μ m or 1.5 - 3 mils thick." This statement is confusing because

Garland does not mention polypropylene fibers having an average density of 0.9 g/cm³ and even if such were disclosed in Garland it is not evident why this would result in a nonwoven of about 38-76 μ m or 1.5 - 3 mils thick. The office action continues by referencing three patents U.S. Patent No. 5,035,941 to Blackburn, U.S. Patent No. 4,704,323 to Duncan et al and U.S. Patent No. 4,441,228 to Marquart et al., citing their respective disclosures of spunbond polypropylene nonwoven of 13 mil thickness of 1.25 oz/yd², 8 mil thickness of 1.6 oz/yd² and 16 mil thickness and 2 oz/yd².

The statement of the rejection does not appear to rely on Blackburn, Duncan et al or Marquart et al. Yet these prior art references are discussed and the office action states “[t]hus, the examiner believes one skilled in the art would recognize that the thickness disclosed by Garland to is incorrect.” It is not clear how the conclusion is reached of what one skilled in the art would recognize. What is evident from Blackburn, Duncan et al or Marquart et al. is that the claimed range of 1 to 2 mils is not taught or suggested by any of Blackburn, Duncan et al or Marquart et al. Blackburn’s 13 mil 1.25 oz/yd² layer is not a teaching or suggestion of a 1-2 mil layer as claimed in appellant’s claims 1 and 10. Duncan et al’s 8 mil 1.6 oz/yd² layer is not a teaching or suggestion of a 1-2 mil layer as claimed in appellant’s claims 1 and 10. Marquart et al’s 16 mil 2 oz/yd² layer is not a teaching or suggestion of a 1-2 mil layer as claimed in appellant’s claims 1 and 10.

The office action at page 5, lines 14-16 concludes that “[a]s such, it would have been obvious to one skilled in the art to employ a thickness within the range claimed by applicant in order to produce a strong and durable, yet flexible drop cloth.” It is not evident to appellant that there is any basis for this statement. There is no explanation of why one of ordinary skill in the art would have employed a thickness within the range claimed by applicant in order to produce a drop cloth. None of Garland, Blackburn, Duncan et al or Marquart et al teach or suggest a 1-2 mil layer as claimed in appellant’s claims 1 and 10. There is no teaching or suggestion in any of Garland, Blackburn, Duncan et al or Marquart et al (1) that Garland’s range of 0.005 to 0.002 mils is in error, (2) to modify Garland as taught by Blackburn, Duncan et al or Marquart et al, or (3) that even if Garland were modified (and such possibility is not conceded) to provide a layer as in one of Blackburn, Duncan et al or Marquart et al that such modification would result in a 1-2 mil layer as claimed in appellant’s claims 1 and 10.

Garland states the drop cloth “preferably is made with a total thickness substantially in the range of 0.0015 to 0.004 mils” (column 4, lines 4-7). This is not even close to the

range in appellant's claims and, at least for this reason, it cannot teach or suggest the claimed range. The office action argues that the 0.0015-0.004 mil range in Garland is in error even though Garland mentions these or similar dimensions repeatedly in columns 3, 4, 5 and 6. In view of the statement in the final office action that Garland's disclosure is not enabling on this point, then the rejection is not proper for the additional reason that Garland is not prior art.¹

Page 5, last six lines and page 6 lines 1-13 of the office action are directed to the second point acknowledged in the office action, i.e., that Garland fails to teach or suggest that the nonwoven layer contains natural or rayon fibers as recited in appellant's claims 1 and 10. The office action points out that Garland teaches the importance of the outer layer being absorbent and that cellulosic fibers are absorbent. It is urged that Reaves teaches a drop cloth of natural or synthetic fibers and Trosper et al teaches a drop cloth of cotton. From this it is concluded that "it would have been obvious to one skilled in the art to substitute fibers that are known to be inherently absorbent fibers suitable for use in the drop cloths, as taught by Garland, Reaves, and Trosper, for the specially treated absorbent polypropylene fibers of the Garland nonwoven."

Notwithstanding the above argument, Garland, taken alone or in combination with one or both of Reaves and Trosper et al, does not teach or suggest a non-woven fabric material including natural or rayon fibers as the first layer as recited in appellant's claims 1 and 10, respectively. Garland bonds spun bonded polypropylene to a polypropylene or polyethylene film (column 2, lines 1-10). Such disclosure, even if the prior art teaches fusing thermoplastic films to natural fibers (and such is not conceded), does not teach or suggest that it would have been obvious to combine a non-woven 1-2 mil layer of fabric including natural (claims 1 and 3-9) or rayon (claims 10 and 12-17) fibers with a layer of liquid impervious plastic material. The claimed non-woven fabric is different from Garland's spun bonded polypropylene fabric. The claimed 1-2 mil layer is different from the thickness of the layers in Garland. The natural (claims 1 and 3-9) or rayon (claims 10 and 12-17) fibers are different from the spun polypropylene in Garland. All of these differences must be considered when determining whether and how to combine the layers. Combining the natural fiber layer of claim 1 and second liquid impervious layer is different from combining the rayon fiber layer of claim 10 and second liquid impervious layer. One of ordinary skill in the art would have

¹ Printed publication will not suffice as prior art if it was not enabling. See In re Donohue, 226 USPQ 619, 621 (Fed. Cir. 1985).

recognized this. The argument that Garland teaches or suggests the claimed combination even though Garland uses different material of different thickness and which is spun bonded rather than non-woven fabric is evidence that the obviousness conclusion is wrong. When all of these considerations are viewed together it is very apparent that the claimed invention as a whole is not taught or suggested by the prior art.

Garland's lack of a disclosure of non-woven fabric material including natural (or rayon) fibers as the first layer is not made up for by Reaves and/or Trosper et al. Reaves, in describing a nonwoven polypropylene sheet, briefly mentions natural fibers including woven fabrics (column 2, lines 55-59), but this is not a teaching or suggestion of non-woven fabric material including natural (or rayon) fibers as recited in appellant's claims. Garland taken alone, or in combination with Reaves, does not teach or suggest non-woven fabric material including natural (or rayon) fibers. Trosper et al's dropcloth with a fabric layer is no better than Reaves. Garland taken alone, or in combination with Trosper et al, does not teach or suggest non-woven fabric material including natural (or rayon) fibers.

For all of the above reasons, there is no *prima facie* case of obviousness. A *prima facie* case of obviousness is established when the teachings of the prior art itself would appear to have suggested the claimed subject matter to one of ordinary skill in the art.² There is nothing in the relied on prior art that teaches or suggests a drop cloth of a non-woven 1-2 mil layer of fabric including natural fibers combined with a layer of liquid impervious plastic material (claims 1 and 3-9) or a drop cloth of a non-woven 1-2 mil layer of fabric including rayon fibers combined with a layer of liquid impervious plastic material (claims 10 and 12-17).

It is submitted that the above-noted conclusions in the office action appear to result from improper hindsight knowledge of applicant's disclosure rather than a proper obviousness conclusion based on information taught or suggested by the prior art.³

Each of the above arguments provide grounds for reversal of the rejection. Moreover, the several separate obviousness conclusions in the office action further demonstrate that at the time of the invention one of ordinary skill in the art aware of Garland would not have found all of these deficiencies to have been obvious. Garland's deficiencies are not made up

² See In re Bell, 991 F.2d 781, 783, 26 USPQ2d 1529, 1531 (Fed. Cir. 1993).

³ Obviousness may not be established using hindsight or in view of the teachings or suggestions of the inventor. See Para-Ordnance Mfg. v. SGS Importers Int'l, 73 F.3d 1085, 1087, 37 USPQ 2d 1237, 1239 (Fed. Cir. 1995) (citing W. L. Gore & Assocs., Inc. v. Garlock, Inc., 721 F.2d 1540, 1551, 1553, 220 USPQ 303, 311, 312-13 (Fed. Cir. 1983), cert. denied, 469 U.S. 851 (1984)).

for by Reaves and/or Trosper (or even Blackburn, Duncan et al or Marquart et al) and for all of these reasons the rejection is improper. Accordingly, reversal of the rejection is, respectfully, requested.

The Rejection of Claim 3 as unpatentable under 35 U.S.C. 103(a)
over Garland (U.S. Patent No. 5,266,390) taken in view of Reaves (U.S. Patent No.
5,368,912) and Trosper et al (U.S. Patent No. 5,761,853).

Claim 3 depends from claim 1 and further requires that the natural fibers include cotton fibers. The office action appears to address the limitations of claim 3 at page 6 wherein it is stated that “it would have been obvious to one skilled in the art to substitute fibers that are known to be inherently absorbent fibers suitable for use in the drop cloths, as taught by Garland, Reaves, and Trosper, for the specially treated absorbent polypropylene fibers of the Garland nonwoven.”

It is not evident that it would have been obvious to one of ordinary skill in the art to replace Garland’s spun bonded polypropylene with a 1-2 mil layer of nonwoven fabric including cotton. In Garland it is disclosed that the spun bonded outer layer(s) are intimately bonded by point bonding, heat bonding or pattern spray adhesive (column 2, lines 1-8). Garland discusses the importance of absorbency, stiffness, toughness and tear resistance. What is the effect on stiffness, toughness and tear resistance when a more absorbent material is used in place of the material taught by Garland? Appellant’s disclosure repeatedly describes the importance of providing a drop cloth that is light-weight, resistant to tearing or puncturing is highly drapable and is absorbent. All of these features are important.

How would replacement of Garland’s spun bonded polypropylene with a 1-2 mil layer of nonwoven fabric including natural fibers (claim 1) or a 1-2 mil layer of nonwoven fabric including rayon fibers (claim 10) affect drapability, weight, absorbency, or tearing and puncture resistance? One of ordinary skill in the art would have had to consider all of these features, since simply making a more absorbent cloth is not the point. The point is making a drop cloth that has all of these important characteristics. Whereas improving one characteristic may be helpful, one of ordinary skill in the art would have known to consider the effect of any change on the other important characteristics. The explanation in the office action is not proper without evidence of the conclusions of one of ordinary skill in the art regarding the effect of the change on each of the important characteristics of the drop cloth.

For at least these additional reasons, the rejection of claim 3 is improper and should be reversed.

The Rejection of Claim 4 as unpatentaable under 35 U.S.C. 103(a)
over Garland (U.S. Patent No. 5,266,390) taken in view of Reaves (U.S. Patent No.
5,368,912) and Tosper et al (U.S. Patent No. 5,761,853).

Claim 4 depends from claim 1 and further requires that the non-woven fabric material has fibers which are oriented in a directional orientation. The office action at page 7 urges that “[i]t has been held to be within the general skill of a worker in the art to select a know material on the basis of it suitability for the intended use.... Hence, claims 4, 5, 12, and 13 are rejected as being obvious variants of the Garland invention.” None of the prior art of record teaches or suggests fibers which are oriented in a directional orientation as recited in claim 4. The statement of obviousness without prior art support is improper. The rejection of claim 4 should be reversed for all of the reasons stated with respect to claim 1 above and further because the combination as recited in claim 4 provides a drop cloth not taught or suggested by Garland taken alone or in combination with Reaves and/or Trosper et al.

The Rejection of Claim 5 as unpatentaable under 35 U.S.C. 103(a)
over Garland (U.S. Patent No. 5,266,390) taken in view of Reaves (U.S. Patent No.
5,368,912) and Tosper et al (U.S. Patent No. 5,761,853).

Claim 5 depends from claim 1 and further requires that the non-woven fabric material has fibers which are randomly oriented. The office action at page 7 urges that “[i]t has been held to be within the general skill of a worker in the art to select a know material on the basis of it suitability for the intended use.... Hence, claims 4, 5, 12, and 13 are rejected as being obvious variants of the Garland invention.” None of the prior art of record teaches or suggests fibers which are randomly oriented as recited in claim 5. The statement of obviousness without prior art support is improper. The rejection of claim 5 should be reversed for all of the reasons stated with respect to claim 1 above and further because the combination as recited in claim 5 provides a drop cloth not taught or suggested by Garland taken alone or in combination with Reaves and/or Trosper et al.

The Rejection of Claim 6 as unpatentable under 35 U.S.C. 103(a)
over Garland (U.S. Patent No. 5,266,390) taken in view of Reaves (U.S. Patent No.
5,368,912) and Tosper et al (U.S. Patent No. 5,761,853).

Claim 6 depends from claim 1 and further requires that the 1-2 mil non-woven fabric material including natural fibers further includes synthetic fibers which are fused together. The office action at page 6 urges that

it would have been obvious to one of ordinary skill in the art to substitute natural or rayon fibers for the polypropylene fibers of the Garland invention. Additionally, it would have been obvious to one of ordinary skill in the art of nonwovens to employ a blend of absorbent fibers and fusible fibers in order to produce a nonwoven web which enhances the bonding of the nonwoven to the plastic film layer of Garland.

There is no prior art basis for the conclusion of obviousness. Without any prior art support, the rejection is clearly improper.

At the end of page 6 of the office action it is stated that “[a]pplicant is hereby given Official Notice that it is well known in the art to employ a blend of synthetic thermoplastic fibers and cellulosic fibers to produce a strong nonwoven fabric being bonded by said thermoplastic fibers and to enhance the nonwoven’s ability to bond to other thermoplastic materials.” The above statement of what is “well known” is not in any prior art context so as to provide some insight as to whether there is any motivation to combine the alleged well known information with the prior art of record. The use of Official Notice at this point in the prosecution (after many office actions, an appeal and an appeal brief) is improper. What is alleged to be well known is challenged as there is no prior art evidence of what is alleged to be well known.

None of the prior art of record teaches or suggests synthetic fibers which are fused together as recited in claim 6. The statement of obviousness without prior art support is improper. The rejection of claim 6 should be reversed for all of the reasons stated with respect to claim 1 above and further because there is no prior art support for the additional feature of claim 6. This further limitation, taken in combination with the features of claim 1, provides a drop cloth not taught or suggested by Garland taken alone or in combination with Reaves and/or Tosper et al.

The Rejection of Claim 7 as unpatentaable under 35 U.S.C. 103(a)
over Garland (U.S. Patent No. 5,266,390) taken in view of Reaves (U.S. Patent No.
5,368,912) and Tosper et al (U.S. Patent No. 5,761,853).

Claim 7 depends from claim 1 and further requires that the second layer is fused to the first layer. The office action does not address this limitation except at page 4 wherein it is suggested that Garland teaches this feature. Garland teaches a fusion type bond between layers 4, 5 and 6, but this is not the same as fusing a 1-2 mil layer of non-woven fabric material including natural fibers to a liquid impervious plastic material second layer as recited in claim 7. Fusing the specific layers recited in claim 7 is not taught or suggested by Garland or Reaves or Trosper et al. The further limitation of claim 7, taken in combination with the features of claim 1, provides a drop cloth not taught or suggested by Garland taken alone or in combination with Reaves and/or Trosper et al.

The Rejection of Claim 8 as unpatentaable under 35 U.S.C. 103(a)
over Garland (U.S. Patent No. 5,266,390) taken in view of Reaves (U.S. Patent No.
5,368,912) and Tosper et al (U.S. Patent No. 5,761,853).

Claim 8 depends from claim 1 and further requires that the second layer comprises polyethylene. The office action addresses this limitation at page 4 wherein it is suggested that Garland teaches this feature. Garland teaches a polyethylene layer, but this is not the same the combination of a 1-2 mil layer of non-woven fabric material including natural fibers and a liquid impervious polyethylene second layer as recited in claim 8. The combination of specific layers recited in claim 8 is not taught or suggested by Garland or Reaves or Trosper et al. The further limitation of claim 8, taken in combination with the features of claim 1, provides a drop cloth not taught or suggested by Garland taken alone or in combination with Reaves and/or Trosper et al.

The Rejection of Claim 12 as unpatentaable under 35 U.S.C. 103(a)
over Garland (U.S. Patent No. 5,266,390) taken in view of Reaves (U.S. Patent No.
5,368,912) and Tosper et al (U.S. Patent No. 5,761,853).

Claim 12 depends from claim 10 and further requires that the non-woven fabric material has fibers which are oriented in a directional orientation. The office action at page 7 urges that “[i]t has been held to be within the general skill of a worker in the art to select a known material on the basis of it suitability for the intended use.... Hence, claims 4, 5, 12,

and 13 are rejected as being obvious variants of the Garland invention.” None of the prior art of record teaches or suggests fibers which are oriented in a directional orientation as recited in claim 12. The statement of obviousness without prior art support is improper. The rejection of claim 12 should be reversed for all of the reasons stated with respect to claim 10 above and further because the combination as recited in claim 12 provides a drop cloth not taught or suggested by Garland taken alone or in combination with Reaves and/or Trosper et al.

The Rejection of Claim 13 as unpatentable under 35 U.S.C. 103(a)
over Garland (U.S. Patent No. 5,266,390) taken in view of Reaves (U.S. Patent No.
5,368,912) and Trosper et al (U.S. Patent No. 5,761,853).

Claim 13 depends from claim 10 and further requires that the non-woven fabric material has fibers which are randomly oriented. The office action at page 7 urges that “[i]t has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use.... Hence, claims 4, 5, 12, and 13 are rejected as being obvious variants of the Garland invention.” None of the prior art of record teaches or suggests fibers which are randomly oriented as recited in claim 13. The statement of obviousness without prior art support is improper. The rejection of claim 13 should be reversed for all of the reasons stated with respect to claim 10 above and further because the combination as recited in claim 13 provides a drop cloth not taught or suggested by Garland taken alone or in combination with Reaves and/or Trosper et al.

The Rejection of Claim 14 as unpatentable under 35 U.S.C. 103(a)
over Garland (U.S. Patent No. 5,266,390) taken in view of Reaves (U.S. Patent No.
5,368,912) and Trosper et al (U.S. Patent No. 5,761,853).

Claim 14 depends from claim 10 and further requires that the 1-2 mil layer of non-woven fabric material including rayon fibers further includes fibers which are fused together. Claim 14 depends from claim 10 and further requires that the 1-2 mil non-woven fabric material including rayon fibers further includes fibers which are fused together. The office action at page 6 urges that

it would have been obvious to one of ordinary skill in the art to substitute natural or rayon fibers for the polypropylene fibers of the Garland invention. Additionally, it would have been obvious to one of ordinary skill in the art of nonwovens to

employ a blend of absorbent fibers and fusible fibers in order to produce a nonwoven web which enhances the bonding of the nonwoven to the plastic film layer of Garland.

There is no prior art basis for the conclusion of obviousness. Without any prior art support, the rejection is clearly improper.

At the end of page 6 of the office action it is stated that “[a]pplicant is hereby given Official Notice that it is well known in the art to employ a blend of synthetic thermoplastic fibers and cellulosic fibers to produce a strong nonwoven fabric being bonded by said thermoplastic fibers and to enhance the nonwoven’s ability to bond to other thermoplastic materials.” The above statement of what is “well known” is not in any prior art context so as to provide some insight as to whether there is any motivation to combine the alleged well known information with the prior art of record. The use of Official Notice at this point in the prosecution (after many office actions, an appeal and an appeal brief) is improper. What is alleged to be well known is challenged as there is no prior art evidence of what is alleged to be well known.

None of the prior art of record teaches or suggests fibers which are fused together as recited in claim 14. The statement of obviousness without prior art support is improper. The rejection of claim 14 should be reversed for all of the reasons stated with respect to claim 10 above and further because there is no prior art support for the additional feature of claim 14. This further limitation, taken in combination with the features of claim 10, provides a drop cloth not taught or suggested by Garland taken alone or in combination with Reaves and/or Trosper et al.

The Rejection of Claim 15 as unpatentable under 35 U.S.C. 103(a)
over Garland (U.S. Patent No. 5,266,390) taken in view of Reaves (U.S. Patent No.
5,368,912) and Trosper et al (U.S. Patent No. 5,761,853).

Claim 15 depends from claim 10 and further requires that the second layer is fused to the first layer. The office action does not address this limitation except at page 4 wherein it is suggested that Garland teaches this feature. Garland teaches a fusion type bond between layers 4, 5 and 6, but this is not the same as fusing a 1-2 mil layer of non-woven fabric material including rayon fibers to a liquid impervious plastic material second layer as recited in claim 15. Fusing the specific layers recited in claim 15 is not taught or suggested by Garland or Reaves or Trosper et al. The further limitation of claim 15, taken in combination

with the features of claim 10, provides a drop cloth not taught or suggested by Garland taken alone or in combination with Reaves and/or Trosper et al.

The Rejection of Claim 16 as unpatentaable under 35 U.S.C. 103(a)
over Garland (U.S. Patent No. 5,266,390) taken in view of Reaves (U.S. Patent No.
5,368,912) and Tosper et al (U.S. Patent No. 5,761,853).

Claim 16 depends from claim 10 and further requires that the second layer comprises polyethylene. The office action addresses this limitation at page 4 wherein it is suggested that Garland teaches this feature. Garland teaches a polyethylene layer, but this is not the same the combination of a 1-2 mil layer of non-woven fabric material including rayon fibers and a liquid impervious polyethylene second layer as recited in claim 16. The combination of specific layers recited in claim 16 is not taught or suggested by Garland or Reaves or Trosper et al. The further limitation of claim 16, taken in combination with the features of claim 1, provides a drop cloth not taught or suggested by Garland taken alone or in combination with Reaves and/or Trosper et al.

The Rejection of Claims 9 and 17 as unpatentaable under 35 U.S.C. 103(a)
over Garland taken in view of Reaves and Tosper et al and further in view of
Wilson (U.S. Patent No. 5,443,885) and Mobley (U.S. Patent No. 5,227,409).

Claims 9 stands or falls with claim 1 and claim 17 stands or falls with claim 10. No further arguments with respect to claims 9 and 17 are, therefore, provided.

Conclusion of Argument

For the foregoing reasons, the appellant, respectfully, requests that the rejection of claims 1, 3-10 and 12-17 be reversed and the application be allowed.

It is respectfully requested that, if necessary to effect a timely response, this paper be considered as a Petition for an Extension of Time sufficient to effect a timely response and shortages in other fees, be charged, or any overpayment in fees be credited, to the Account of Barnes & Thornburg, Deposit Account No. 10-0435 (32251/70829).

Respectfully submitted,

BARNES & THORNBURG

A handwritten signature in black ink, appearing to read "Richard B. Lazarus", written in a cursive style.

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Appendix A (Copy of Claims on Appeal)

1. A drop cloth for covering a surface, comprising:
 - a first layer having a non-woven fabric material, said non-woven fabric material including natural fibers; and
 - a second layer attached to said first layer, said second layer having a liquid impervious plastic material;wherein said first layer has a thickness;
wherein said thickness is in the range of 1 to 2 mils.
2. Canceled
3. The drop cloth of claim 1, wherein said natural fibers include cotton fibers.
4. The drop cloth of claim 1, wherein said non-woven fabric material has fibers which are oriented in a directional orientation.
5. The drop cloth of claim 1, wherein said non-woven fabric material has fibers which are randomly oriented.
6. The drop cloth of claim 1, wherein said non-woven fabric material further includes synthetic fibers which are fused together.
7. The drop cloth of claim 1, wherein said second layer is fused to said first layer.
8. The drop cloth of claim 1, wherein said second layer comprises polyethylene.
9. The drop cloth of claim 1, wherein said second layer has an adhesive material disposed thereon that facilitates a temporary attachment of said second layer to said surface.
10. A drop cloth for covering a surface, comprising:
 - a first layer having a non-woven fabric material, said non-woven fabric material including rayon fibers; and
 - a second layer attached to said first layer, said second layer having a liquid impervious plastic material;wherein said first layer has a thickness;
wherein said thickness is in the range of 1 to 2 mils.
11. Canceled

12. The drop cloth of claim 10, wherein said non-woven fabric material has fibers which are oriented in a directional orientation.

13. The drop cloth of claim 10, wherein said non-woven fabric material has fibers which are randomly oriented.

14. The drop cloth of claim 10, wherein said non-woven fabric material has fibers which are fused together.

15. The drop cloth of claim 10, wherein said second layer is fused to said first layer.

16. The drop cloth of claim 10, wherein said second layer comprises polyethylene.

17. The drop cloth of claim 10, wherein said second layer has an adhesive material disposed thereon that facilitates a temporary attachment of said second layer to said surface.